Petition

81-1888

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MORGAN DRIVE AWAY, INC.,
NATIONAL TRAILER CONVOY, INC.
and TRANSIT HOMES, INC.,
Petitioners,

v.

ZARNOFF O. SAMFORD and
MARTIN TRAILER TOTERS, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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April 12, 1982

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QUESTION PRESENTED

Whether the Court of Appeals erred in holding that state law governs the determination of whether a party has standing to bring an action under the federal antitrust laws.

PARTIES IN THE COURT OF APPEALS

Respondents Zarnoff O. Samford and Martin Trailer Toters, Inc. were parties in the Court of Appeals. Petitioners Morgan Drive Away, Inc., National Trailer Convoy, Inc., and Transit Homes, Inc. were parties in the Court of Appeals. The Washington Bank and Trust Company of Bogalusa, Louisiana is an interested party. CLC of America, Inc., PepsiCo, Inc., and THI, Inc. are parent companies of the petitioners. Harry Martin and Shirkee A. Samford were named in the caption in the Court of Appeals because they were named in the original caption in the District Court, but they were deleted from the action before the decision of the District Court that was the subject of review by the Court of Appeals for the Fifth Circuit.

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Petitioners,

v.

ZARNOFF O. SAMFORD and
MARTIN TRAILER TOTERS, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 11, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 665 F.2d 598 and appears as Appendix A to this Petition. The District Court for the Eastern District of Louisiana issued an opinion which has not been reported but which appears as Appendix B.

JURISDICTION

This action was brought under 15 U.S.C. §§ 1 and 2 (1976), provisions of the federal antitrust laws, and the District Court had jurisdiction under 15 U.S.C. § 15 (1976) and 28 U.S.C. § 1331 (Supp. 1980) concerning actions arising under federal law. The District Court dismissed the action on April 18, 1980 (filed April 24, 1980).

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 (1976) to review the final decision of the District Court. The judgment of the Court of Appeals, entered on January 11, 1982, vacated the District Court's decision and remanded the case.

This Court has jurisdiction to review the decision of the Court of Appeals under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

15 U.S.C. § 15. Suits by persons injured; amount of recovery

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained . . . .

28 U.S.C. § 1331. Federal question

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

This federal antitrust action has been prosecuted primarily by one person, Zarnoff O. Samford, who has changed the basis upon which he asserts standing at least four times in the course of the litigation. Complaint (March 9, 1976); Amending Complaint (April 22, 1976); Second Amending Complaint (June 14, 1976); Third Amending Complaint (July 21, 1976); Plaintiffs'

Response To Defendants' Joint Motion To Dismiss (July 14, 1978). Samford is a former employee and shareholder of Martin Trailer Toters, Inc. ("MTTI"), a Louisiana corporation allegedly injured by asserted violations of the Sherman Act.

The District Court dismissed the action four years after it was filed, concluding that Samford had no standing to bring the federal antitrust claim, either as an individual or on behalf of MTTI. Samford was then asserting standing on the basis of a 1978 transaction by which he had attempted to purchase the right of action against the defendants. The District Court decided that the 1978 transaction was ineffective to give Samford standing under the federal antitrust laws.

A brief review of Samford's shifting theories of standing is important to an understanding of the District Court's decision, because it reveals the factual basis and context for the decision. On March 9, 1976, this action was commenced by the filing of a complaint in the names of three individuals: Harry Martin, and two brothers, Zarnoff O. Samford and Shirkee A. Samford. The complaint alleged that Harry Martin had organized a corporation called Martin Trailer Toters, Inc. for the business of transporting mobile homes and that the three individuals had "owned substantial interest in MTTI from August of 1973 to February of 1976." Complaint ¶ IV. The complaint alleged that the three defendants, all companies engaged in the business of transporting mobile homes, had violated Sections 1 and 2 of the Sherman Act and that the alleged violations had caused MTTI damages amounting to eighty million dollars ($80,000,000). An Amending Complaint filed on April 22, 1976 purported to add MTTI as a plaintiff. Amending Complaint ¶ II.

Discovery later revealed that none of the three individuals had authority in April, 1976, to make MTTI a party to the action. Harry Martin had sold his interest in the corporation to Shirkee Samford and had with-

drawn from any involvement in the operation of the business in 1973. Zarnoff Samford had transferred his interest to his brother, Shirkee Samford, in 1973. *Martin* v. *Morgan Drive Away, Inc.*, 665 F.2d 598, 600 (5th Cir. 1982) (attached as Appendix A). Although Shirkee Samford was the sole shareholder in MTTI between 1973 and early 1976, by April of 1976 he had no authority to act for MTTI either. Shirkee Samford filed a voluntary petition for bankruptcy on January 26, 1976. His shares of MTTI stock, which had been pledged to the Washington Bank and Trust Company of Bogalusa, Louisiana ("Bank") in 1973 as security for a loan, were among the assets that were submitted to the trustee in bankruptcy with the filing of the petition. In the spring of 1976 the Bank took possession of all the stock in MTTI. *Id.*

When defendants challenged Zarnoff Samford's authority to act on behalf of MTTI, he claimed that MTTI had assigned the claim to him shortly before Shirkee Samford declared bankruptcy. Second Amending Complaint. When defendants challenged the validity of that assignment, Zarnoff Samford then alleged that he had entered into an agreement with the Bank on May 8, 1978 by which he had purchased all the shares of MTTI stock. As a result, he asserted authority to bring the antitrust action on behalf of the company. Arguing against dismissal, Zarnoff Samford also claimed to have an individual right of action as a former employee of MTTI. *Id.* at 601.

The 1978 transaction between the Bank and Zarnoff Samford was effected by two documents, one labelled "Sale of Stock" and the other labelled "Agreement." Copies of these documents are attached as Appendix C. The Sale of Stock declared that the Bank was transferring fifty-four shares of MTTI stock to Zarnoff Samford in return for one thousand dollars ($1,000), the execution of a ninety-day note for four thousand dollars ($4,000), and "other valuable consideration." The Agreement specified

that the payment of "other valuable consideration" depended upon Samford's success in prosecuting the antitrust action:

> NOW, therefore, it is understood and agreed by and between the parties hereto that the other valuable consideration contained in the sale of the Martin Trailer Toters, Inc. stock, unto Zarnoff O. Samford is to be payment of the remaining indebtedness of FIFTY-NINE THOUSAND, NINE HUNDRED AND THIRTEEN AND NO/100 ($59,913.00), DOLLARS, owed to the Washington Bank and Trust by Martin Trailer Toters, Inc. at the completion of the above mentioned lawsuit and after the completion of said lawsuit out of the proceeds, if any, received by way of settlement or judgment.

At the time of the 1978 transaction, MTTI held no asset other than the right of action and had not been an operating company for at least two years. MTTI's operating authority was the subject of a transfer proceeding before the Louisiana Public Service Commission in November of 1976, and transfer to a third party followed. Louisiana Public Service Commission Order T-13189 is attached as Appendix D.

The defendants moved to dismiss on the ground that the 1978 transaction was champertous and void, and, therefore, did not give Samford standing. The District Court denied the defendants' motion to dismiss on March 9, 1979, providing Zarnoff Samford with the opportunity to amend his complaint to state a basis for his antitrust claim as an individual. Samford filed no amendment.

Subsequently, additional briefs were filed concerning both the 1978 transaction and Samford's failure to establish standing to bring an antitrust claim as an individual. The trial court dismissed the complaint, holding that the 1978 agreement between the Bank and Zarnoff Samford failed to give Samford standing to bring the antitrust action in the name of MTTI because the transaction constituted champerty. *Martin* v. *Morgan Drive*

Away, Inc., No. 76-640 (E.D. La., filed Apr. 24, 1980) (attached as Appendix B). In so holding, the District Court relied upon federal cases applying general common law principles, without referring to the Louisiana Civil Code. The District Court also held that Samford had failed to state a cause of action in his individual capacity.

The Court of Appeals for the Fifth Circuit recognized that Samford had abandoned his individual claim. The Court of Appeals held that Samford's assertion of standing predicated on the 1978 transaction should be judged under Louisiana law, and that, under the Louisiana Civil Code, the agreement was effective to give federal standing. As a consequence, it vacated the District Court's dismissal of the action and remanded the case for further proceedings.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CONFLICTS WITH STANDARD PRINCIPLES OF FEDERAL JURISDICTION APPLIED BY THIS COURT AND THE COURTS OF APPEALS, AND ENCOURAGES INCONSISTENT ENFORCEMENT OF THE ANTITRUST LAWS IN CONTRADICTION OF PUBLIC POLICY.

The standing of a plaintiff to sue in federal court on a right of action created by the federal antitrust laws is governed by federal law. *E.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979) (Supreme Court applied federal precedents to determine whether consumers had standing to bring antitrust action); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) (indirect purchasers held not to have standing to bring antitrust claim on basis of analysis of federal statutes and federal policies); *Bogus* v. *American Speech & Hearing Association*, 582 F.2d 277 (3d Cir. 1978) (antitrust plaintiff held to have standing based on federal precedents); *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) (issue of standing of potential competitor to bring anti-

trust claim remanded on basis of federal law); *Guthrie* v. *Genesee County, New York*, 494 F. Supp. 950 (W.D.N.Y. 1980) (shareholders and employees of allegedly injured corporation held to have no antitrust standing on basis of federal precedents).

Contrary to this line of precedent, the Fifth Circuit's decision in this case makes state law determinative of the standing of a federal antitrust plaintiff. The defendants contended that the 1978 transaction by which Zarnoff Samford purported to buy the stock of the defunct corporation, MTTI, failed to give Samford federal antitrust standing because it was, on its face, champertous. In *Kenrich Corp.* v. *Miller*, 377 F.2d 312 (3d Cir. 1967), the Third Circuit explained the elements of champerty:

> [A]n arrangement offends public policy against champerty and is illegal if it provides for the institution of litigation by and at the expense of a person who, but for that agreement, has no interest in it, with the understanding that his reward is to be a share of whatever proceeds the litigation may yield. A plaintiff who sues on what would be another's claim except for such a champertous agreement will not be permitted to maintain an action.

377 F.2d at 314 (citations omitted). Applying this rule and generally-recognized common law principles regarding champerty, the District Court held that the 1978 transaction was champertous and therefore ineffective to give Samford standing to bring the federal antitrust claim. *Martin* v. *Morgan Drive Away, Inc.*, No. 76-640, Slip Op. at 1 (E.D. La. filed Apr. 24, 1980) (attached as Appendix B).

The Court of Appeals vacated the District Court's decision, ruling that the 1978 transaction was a sound basis for federal antitrust standing because it was not champertous under Louisiana civil law:

> Louisiana, being a civil law jurisdiction, does not apply general common law principles of champerty

> . . . . Hence under Louisiana law, the 1978 agreement was not champertous.

665 F.2d at 605 (citations and footnote omitted). The Fifth Circuit's decision makes the determination of whether an attempted transfer of a federal cause of action is effective to grant standing depend upon Louisiana law.[1] This holding directly conflicts with the analysis employed by other Courts of Appeals regarding transfers of antitrust actions by assignment or by operation of law.

A federal antitrust claim can be assigned in appropriate circumstances, but whether an assignment is effective to transfer antitrust standing is a matter of federal law, independent of state law regarding the assignment of claims. *Hicks* v. *Bekins Moving & Storage Co.*, 87 F.2d 583 (9th Cir. 1937). *See also Pacific Coast Agricultural Export Association* v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976); *Isidor Weinstein Investment Co.* v. *Hearst Corp.*, 303 F. Supp. 646 (N.D. Cal. 1969). Similarly, whether an action under the federal antitrust laws survives the death of the original party plaintiff is determined as a matter of federal law, independent of state law regarding the survival of personal injury actions. *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975) (subsequent history omitted); *Barnes Coal Corp.* v. *Retail Coal Merchants Association*, 128 F.2d 645 (4th Cir. 1942); *Moore* v. *Backus*, 78 F.2d 571 (7th Cir.), *cert. denied*, 296 U.S. 640 (1935); *Cinnamon* v. *Abner A. Wolf, Inc.*, 215 F. Supp. 833 (E.D. Mich. 1963). The determination of whether an antitrust plaintiff has impermissibly split a cause of action and, therefore, cannot prosecute the lawsuit, also is a matter of federal, not state, law. *Hayes* v.

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[1] The Fifth Circuit made no determination with respect to whether the 1978 agreement would be champertous under federal law. In dicta the Court of Appeals stated that if federal law were to be applied, an evidentiary hearing concerning the champertous nature of the 1978 transaction would be required. 665 F.2d at 605, n. 6.

Solomon, 597 F.2d 958 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980). The question of whether a contract to settle an antitrust case is binding similarly is governed by federal law. *Theatre Time Clock Co.* v. *Motion Picture Advertising Corp.*, 323 F. Supp. 172 (E.D. La. 1971).

The Fifth Circuit attempts to distinguish between the cases holding that the assignment of federal antitrust actions are governed by federal law and the case at hand, stating:

> [T]here is a line of precedent holding that federal antitrust claims are assignable as a matter of law. Our concern here, however, is not with the substance of assignable claims, but with the form in which the claim may be assigned.

665 F.2d at 604. The Court of Appeals thus mischaracterizes the issue, which is whether the transaction between the Bank and Zarnoff Samford is effective, as a matter of federal law, to give Samford standing to assert the federal antitrust claim. Defendants challenged the legal effect of the substance of the transaction, not its form. In substance it was an attempt to purchase a right of action by one who was otherwise legally without standing.[2]

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[2] It is apparent that the 1978 transaction was an attempt to purchase the right of action. MTTI had ceased doing business in 1976 when its stock was acquired by the Bank. The only asset of MTTI except the cause of action against defendants was its certificate of public convenience to operate as a common carrier in Louisiana. The Bank sold that certificate to a third party before it sold the MTTI stock to Samford. Thus, the only asset acquired by Samford was the cause of action against defendants. The very terms of the agreement indicate that it constituted speculation in litigation, since the amount of consideration to be paid depended upon Samford's success in prosecuting the suit. The agreement also specified that Samford should bear all the costs of the litigation. At the time of the 1978 transaction, Samford owned no interest in MTTI or its claims. Thus, all the requisites of common-law champerty were apparent in the transaction. Kenrich Corp. v. Miller, 377 F.2d 312 (3d Cir. 1967); Jamison Coal & Coke Co. v.

The Fifth Circuit based its decision primarily on *Sampliner* v. *Motion Picture Patents Co.*, 255 F. 244 (2d Cir. 1918), *rev'd on other grounds*, 254 U.S. 233 (1920), because the Fifth Circuit considered *Sampliner* to "enunciate a general federal rule" and to be "the only case we have discovered which is directly on point." 665 F.2d at 605. In *Sampliner* the Second Circuit affirmed the district court's finding that an antitrust plaintiff had purchased the right of action for speculation and held the transaction champertous and void. *Sampliner* v. *Motion Picture Patents Co.*, 243 F. 277, 278-9 (S.D.N.Y. 1917) (subsequent history omitted).[3]

Applying *Sampliner*, the Fifth Circuit concluded in the instant case that state law should control issues of antitrust standing and champerty because the Second Circuit examined the state law of Ohio in reaching its decision. Significantly, the Fifth Circuit failed to note that the parties in *Sampliner* agreed to the application of Ohio law, so that the question of whether state law should

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Goltra, 143 F.2d 899 (8th Cir. 1944); American Optical Co. v. Curtiss, 56 F.R.D. 26 (S.D.N.Y. 1971); Welch v. Coro, Inc., 97 F. Supp. 185 (S.D.N.Y. 1951).

[3] The district court declared in Sampliner:

> It certainly never could have been the intent of Congress that so important a remedy, having to do with the appropriate conduct of the business of this country, should be the subject-matter of bargain, sale and speculation at the hands of attorneys. . . . I have a strong conviction that it never will be held in a federal court . . . that such a cause of action is merchandise . . . .

243 F. at 278-9. The Second Circuit, in affirming that case, further defined the offensive practice:

> And in champerty there is a bargain with the plaintiff or defendant by which the champertor is to carry on the suit at his own expense and is to derive some profit out of the thing sued for if he prevails. *Roberts* v. *Cooper*, 20 How. 467, 484, 15 L.Ed. 969 . . . . And a champertous agreement is of course void and unenforceable.

255 F. at 247 (citations omitted).

control federal antitrust standing was not in issue. In fact, the Second Circuit also examined and applied other common law sources concerning champerty, 255 F. at 246-7, since there were relatively few federal decisions on point. The Fifth Circuit has mistaken the *Sampliner* court's review of the available sources in state law for a decision that state law should control.[4]

Even the Fifth Circuit recognized that there is a serious conflict between its reading of *Sampliner* and other decisions concerning federal antitrust actions. It noted that federal law governs the validity of a release of antitrust claims, not state law, and conceded:

> There is a hidden tension between these decisions and *Sampliner*, since they apply a rule of federal law in the interests of uniformity of treatment of antitrust claims whereas *Sampliner* applies federalist conflict of law notions which suggest that local law will control.

665 F.2d at 605. The conflict between the Fifth Circuit's decision and traditional principles for determining whether a party has standing to bring a federal antitrust action is irreconcilable, and it warrants this Court's grant of certiorari.[5]

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[4] In fact one federal court has declared an attempted stock purchase to be champertous and ineffective to give a plaintiff federal antitrust standing without reference to state law. District Distributors, Inc. v. Heublein, Inc., 1971 Trade Cas. ¶ 73,695 (D.D.C. 1971). There, as here, a former employee had attempted to purchase a federal antitrust claim from a corporation. The purpose of the transaction was apparent from a contingency clause in the agreement by which the former employee promised to pay more money if he were successful in the prosecution of the suit.

[5] The Fifth Circuit's decision holds that a transaction that is valid under state law is necessarily valid for jurisdictional purposes under federal law. This Court has held differently in analogous cases involving improper attempts to establish federal jurisdiction. *See* Kramer v. Caribbean Mills, Inc., 394 U.S. 823 (1969), where plaintiff argued that the assignment to him of an interest in a stock-purchase agreement was valid under Texas law, and, there-

If allowed to stand, the Fifth Circuit's decision will create a precedent which will result in variance among the fifty states as to whether a party has standing to bring a federal antitrust claim. Louisiana law is different from that of the common law states, and the laws of the common law states differ from each other. As a result, the decision invites disparity in the treatment of antitrust plaintiffs and "forum shopping," both of which are contrary to the public interest in uniform enforcement of the antitrust laws.[6] *See Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). As the Fifth Circuit itself noted, federal law has been held to govern the survival, the assignment, and the release of federal antitrust claims because of an interest in "uniformity of treatment of antitrust claims." *See* 665 F.2d at 605. Because the decision below threatens the public interest in "uniform treatment of antitrust claims," review by this Court is particularly necessary.

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fore, it was "necessarily . . . valid for purposes of federal jurisdiction." 394 U.S. at 829. The Court rejected this contention, declaring, "The existence of federal jurisdiction is a matter of federal, not state, law." *Id. Accord*, Prudential Oil Corp. v. Phillips Petroleum Co., 546 F.2d 469 (2d Cir. 1976) (assignment failed to establish federal jurisdiction). *See also* O'Brien v. AVCO Corp., 425 F.2d 1030 (2d Cir. 1969) ("[T]he legality of a relationship for state law purposes does not control its effect on federal jurisdiction.").

[6] Because of the immense costs and burdens imposed on the parties and the judiciary by antitrust litigation and because treble damages provide a "windfall" incentive to bring such actions, clear and consistent law on standing is a necessary protection against unwarranted suits. *See generally* Reiter v. Sonotone Corp., 442 U.S. 330, 345-6 (1979); Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266 (5th Cir. 1979); Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). Therefore, prompt resolution of the question of whether state law governs federal antitrust standing is vital to the conservation and allocation of judicial resources.

CONCLUSION

For the reasons discussed above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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April 12, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT A

No. 80-3371

HARRY MARTIN, ET AL.,
Plaintiffs,

ZARNOFF O. SAMFORD and
MARTIN TRAILER TOTERS, INC.,
Plaintiffs-Appellants,

v.

MORGAN DRIVE AWAY, INC., ET AL.,
Defendants-Appellees.

Jan. 11, 1982

Appeal from the United States District Court
for the Eastern District of Louisiana

Before REAVLEY, RANDALL and SAM D. JOHNSON, Circuit Judges.

RANDALL, Circuit Judge:

Plaintiffs Zarnoff Samford and Martin Trailer Toters, Inc. ("MTTI") appeal the district court's determination that Samford had no standing to pursue an antitrust claim against defendants because his right to sue on behalf of MTTI was based upon an assignment which was invalid under the ancient and little used doctrine of champerty. Plaintiffs also claim that MTTI's suit against defendants was also improperly dismissed. We vacate the district court's judgment and remand for further proceedings.

Martin Trailer Toters, Inc. is a Louisiana corporation begun in 1962 as a sole proprietorship by Harry Mar-

tin. Martin later incorporated the business, and in 1967, he transferred one share of the corporation's stock to his son-in-law, plaintiff Zarnoff Samford, and one share to Samford's brother, Shirkee Samford. On February 26, 1973, Zarnoff Samford ended his ownership in MTTI by selling his stock to his brother Shirkee. Shirkee thereby became the sole owner of MTTI. At about this time Zarnoff Samford ended his employment relationship with MTTI.

Shirkee Samford filed for bankruptcy three years later on January 26, 1976, and in the course of the bankruptcy proceedings in the spring of 1976, his MTTI stock became the property of the Washington Bank and Trust Company of Bogalusa, ("Washington Bank"), one of Shirkee Samford's creditors.

On March 6, 1976, while the bankruptcy proceedings were ongoing, Zarnoff Samford, Shirkee Samford, and Harry Martin, in their individual capacities as former or then-present owners of MTTI, brought an antitrust action in federal district court against defendants Morgan Drive Away, Inc., National Trailer Convoy, Inc., and Transit Homes, Inc. The complaint alleged violations by defendants of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. The plaintiffs sought injunctive relief as well as damages for injuries to MTTI allegedly caused by defendants' practices. Defendants moved to dismiss on the ground that the plaintiffs as shareholders had no standing to file an action for injuries sustained by the corporation. On April 23, 1976, plaintiffs amended their complaint by adding MTTI as a plaintiff.

On June 14, 1976, plaintiffs filed a "Second Amending Complaint" which stated that on January 16, 1976 (two months prior to the original complaint and ten days before Shirkee Samford filed for bankruptcy), MTTI had assigned its claim against defendants to Zarnoff Samford. Because this allegation, if true, would have made Zarnoff Samford the only proper party plaintiff, Samford

did not oppose defendant's motion for dismissal as to Shirkee Samford and Harry Martin. On June 23, 1976, Zarnoff Samford filed a "Third Amending Complaint" that eliminated these original parties, and they were subsequently dismissed by the court.

After Samford had filed his "Third Amending Complaint," defendants sought and obtained permission to engage in discovery to ascertain who the proper party plaintiffs, if any, were in this case. Two years later, on June 9, 1978, defendants filed a supplemental memorandum in support of their motion to dismiss. Defendants now argued that the assignment of MTTI's claim to Zarnoff Samford was a conveyance in fraud of Shirkee Samford's creditors; therefore the conveyance was void and Zarnoff Samford had no standing to seek recovery.

Zarnoff Samford responded to the motion to dismiss by alleging that on May 8, 1978, he entered into an agreement with Washington Bank by which he purchased all of MTTI's stock. Under the terms of the agreement Samford paid Washington Bank $1,000 immediately, promised to pay $4,000 more within three months, and promised to pay Washington Bank "other valuable consideration" out of the proceeds of the suit with defendants as follows:

> NOW, therefore, it is understood and agreed by and between the parties hereto that the other valuable consideration contained in the sale of the Martin Trailer Toters, Inc. stock unto Zarnoff O. Samford is to be payment of the remaining indebtedness of FIFTY-NINE THOUSAND, NINE HUNDRED AND THIRTEEN AND NO/100 ($59,913.00 DOLLARS), owed to the Washington Bank and Trust by Martin Trailer Toters, Inc. at the completion of the above mentioned lawsuit and after the completion of said lawsuit out of the proceeds, if any, received by way of settlement or judgment.

IT IS FURTHER UNDERSTOOD that the said Zarnoff O. Samford is prosecuting and controlling the aforementioned antitrust claim against the named defendants above mentioned and is to be responsible for all costs of litigation.

II. Rec. 262-63.

Samford now asserted that, as sole owner of MTTI, he had the right to sue on its behalf. He also asserted the right to bring the lawsuit in his individual capacity. Defendants argued in response that the agreement with MTTI was champertous on its face and therefore void, and that Samford could not sue on behalf of MTTI. Defendants also argue that Samford had not established a personal injury which would permit him to sue in an individual capacity.

The trial court denied defendants' motion to dismiss on March 9, 1979, and gave Samford time to amend his complaint to state the grounds upon which he based his individual claim of injury for violations of the antitrust laws. Samford made no amendments, and on April 18, 1980, the trial court dismissed the plaintiffs' complaint against defendants. It held that the agreement with Washington Bank was champertous and void and that Samford could not use the agreement to maintain his suit; the court also held that Samford had not stated sufficiently a theory upon which he could sue in an individual capacity. The trial court did not mention MTTI as a plaintiff or MTTI's suit when the court dismissed defendants. Samford and MTTI appeal from this dismissal of their suits.

We make two observations before beginning our analysis of this case. First, we note that Zarnoff Samford has abandoned his claim that he has individual standing to prosecute this law suit. In a supplemental memorandum filed on March 6, 1979, Samford stated that

> there is no longer any need for him *as an individual* to proceed, consequently, this plaintiff *in his individ-*

> *ual capacity* does not object to his dismissal as an individual *without prejudice.* Although this plaintiff agrees with the Court that he has an individual claim, he does not wish to assert it because such a claim may cause confusing proof of damage problems to the jury all of which may unduly complicate the case and prolong this litigation. (emphasis in original)

Because Samford has abandoned his individual claim, we do not consider whether the trial court's later dismissal for lack of individual standing was proper. We are thus left with the question only of whether Samford has standing as owner of MTTI or as an assignee of MTTI's claims against defendants.

Second, the parties made all of their arguments to this court and the trial court below in terms of whether Samford has standing to litigate MTTI's claim. The trial court also apparently accepted this characterization, as it dismissed the suit against defendants on the grounds that the fact that the agreement with Washington Bank was champertous left Samford with no standing to prosecute his claim. Our view of the matter is that the problems presented here are better described as involving the question of whether Samford is the real party in interest in this litigation under Rule 17(a). Although the defendants have not raised the real party in interest claim in this litigation, the standing issue was raised from the very beginning, and in the circumstances of this case, where Samford has no individual claim, we are convinced that he has standing only if he is the real party in interest by virtue of ownership of MTTI or an assignment therefrom. *See Piambino* v. *Bailey*, 610 F.2d 1306 (5th Cir.), *cert. denied*, 449 U.S. 1011, 101 S.Ct. 568, 66 L.Ed.2d 469 (1980); *Audio-Visual Marketing Corp.* v. *Omni Corp.*, 545 F.2d 715 (10th Cir. 1976); *United States* v. *936.71 Acres of Land, More or Less, in Brevard County, State of Florida*, 418 F.2d 551 (5th Cir. 1969). Hence the analysis which

follows will focus upon whether Samford is the real party in interest to this lawsuit.

These preliminary considerations aside, our view of the case, simply stated, is that the trial court erred in not holding an evidentiary hearing on the issue of Samford's standing to prosecute this action. As discussed *infra*, Samford's standing or its absence is based upon several disputed issues of fact. Thus a summary disposition of the type made by the trial court was inappropriate.[1]

The first problem concerns the alleged January 16, 1976 assignment of MTTI's claim to Zarnoff Samford. The trial court made no mention of this assignment in its dismissal of Samford's claim, discussing only Samford's lack of individual standing and his lack of standing as assignee based upon the allegedly champertous Washington Bank agreement. However, if the January 16, 1976 assignment was a valid one, lack of individual standing and the invalidity of the Washington Bank agreement would be irrelevant, for the 1976 assignment by itself would have given Samford standing.

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[1] The trial court dismissed the suit under Rule 12(b), but did not specify whether the dismissal was under 12(b)(1), lack of subject matter jurisdiction, or 12(b)(6), failure to state a claim upon which relief can be granted. If the latter, the court could not look beyond the face of the pleadings and thus if dismissal was conditioned upon contestable issues of fact, the trial court's action was improper. If the court's action was based on Rule 12(b)(1), it could go beyond the pleadings to determine its own jurisdiction, but since it did not hold an evidentiary hearing to determine the disputed factual issues, its dismissal on that ground would also be improper. *See Williamson* v. *Tucker*, 645 F.2d 404 (5th Cir. 1981). This circuit has stated that dismissal for lack of subject matter jurisdiction "should be granted sparingly," and that "where adequate time is given to complete discovery and all the jurisdictional facts are fully developed and placed before the court during an adversary hearing, a district court may, in a clear-cut case, dismiss an anti-trust suit for lack of subject matter jurisdiction." *Chatham Condominium Associations* v. *Century Village, Inc.*, 597 F.2d 1002, 1012-13 (5th Cir. 1979).

Defendants argue that even if this is so, Samford abandoned this theory of standing after he alleged the existence of the agreement with Washington Bank. However, we find the record ambiguous as to this point. It is true that Samford did not mention the 1976 assignment when he alleged that he had purchased MTTI's stock from Washington Bank in 1978. On the other hand, Samford never deleted the reference to the 1976 assignment in his complaint. Moreover, although he stated that he was abandoning his "individual" theory of standing, it is not at all clear that this included the theory based upon the 1976 agreement. Hence we think it was improper for the district court to have neglected addressing this issue when it dismissed the defendants.

It is of course possible that the 1976 agreement is an invalid assignment of MTTI's claims. The defendants have suggested in their brief and elsewhere in the record that, in view of the fact that the assignment occurred ten days before Shirkee Samford filed for bankruptcy, the assignment was a fraud upon Shirkee Samford's creditors and therefore invalid. As a threshold matter, before making any determination as to the validity of the assignment, it would be necessary to make a determination as to the defendants' standing to challenge the assignment on this basis and whether that standing is affected by later agreement with the Washington Bank. If the defendants do have standing, then an evidentiary hearing will be necessary to determine the legal status of the assignment.

Champerty Issues

The trial court held that Samford had no standing to sue on behalf of MTTI because the Washington Bank agreement which gave him standing was champertous on its face and therefore void. We disagree.

Champerty is an extremely ancient doctrine which developed early in the history of the common law, but whose

roots go back even further.[2] Its scope has generally been constricted in the past century. At present, in some jurisdictions, the doctrine does not exist at all at common law and a statutory scheme is all that remains. *E.g.*, *Alexander* v. *Unification Church of America*, 634 F.2d 673 (2d Cir. 1980) (applying New York law).

A champertous agreement is one in which a person without interest in another's litigation undertakes to carry on the litigation at his own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation. 14 C.J.S. Champerty and Maintenance § 1 (1939). See Restatement of Contracts § 540(2), § 542(1) (1932). Champerty is a special form of maintenance, which is essentially officious intermeddling in a suit in which one has no interest by assisting a party in its prosecution. Champerty is maintenance with compensation derived from the proceeds of the suit. 14 C.J.S. Champerty and Maintenance §§ 2 and 3 (1939).[3]

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[2] For an account of the origins and genesis of the doctrine, *see generally* Radin, *Maintenance by Champerty*, 24 Calif.L.Rev. 48 (1934).

[3] Defendants do not argue that the assignment here is champertous because it is an assignment of a claim *ex delicto* rather than a contractual claim. *See* 14 C.J.S. Champerty and Maintenance § 6; Restatement of Contracts § 547(1)(d). It is well settled in the federal courts that antitrust claims are assignable. *E.g.*, *Jefferson City Pharmaceutical Association, Inc.* v. *Abbott Laboratories*, 656 F.2d 92 (5th Cir. 1981); *D'Ippolito* v. *Cities Service Company*, 374 F.2d 643 (2d Cir. 1967); *Louisiana Farmers' Protective Union, Inc.* v. *Great Atlantic & Pacific Tea Company of America*, 131 F.2d 419 (8th Cir. 1942); *Hicks* v. *Bekins Moving & Storage Co.*, 87 F.2d 583 (9th Cir. 1937); *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 232 F. 574 (2d Cir. 1916). In *Sampliner* v. *Motion Picture Patents Co.*, 255 F. 242 (2d Cir. 1918), *rev'd on other grounds*, 254 U.S. 233, 41 S.Ct. 79, 65 L.Ed. 240 (1920), the court explained:

> At common law no right of action, whether a right in rem or a right in personam, whether it arose ex contractu or ex delicto, was assignable. Lord Coke wrongly attributed the rule

Samford argues that the law of Louisiana, the forum state as well as the forum where the assignment was entered into, should determine the validity of the assignment, and therefore that the Louisiana law of champerty controls. If this were a diversity case, the question would be easily determined. However, Samford is suing under the federal antitrust laws.

The general rule is that the question of whether a person is a real party in interest under Rule 17(a) is decided by the substantive law of the forum which created the right being sued upon. *U.S.* v. *936.71 Acres of Land*,

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to the doctrine of maintenance and the aversion to the "multiplying of contentions and suits." Lampets' Case, 10 Rep. 48a. The rule is older than the doctrine of maintenance in English law. As Professor Ames, in his Lectures on Legal History, 211, 212, pointed out, the reason for the rule is in the fact that a chose in action always presupposes a personal relation between two individuals and that personal relation cannot be assigned. And see Pollock on Contracts (5th Ed.) 206; Holmes, Common Law, 340, 341; 2 Spence, Eq.Jur. 850. But the courts of equity always recognized the assignment of choses in action, and in England and in this country generally statutes have been passed which have modified the rule that choses in action are not assignable at law. So that now rights of action arising ex contractu and those arising ex delicto, but not for personal torts, are assignable. The right of action which the Lake Shore Company claimed to have for the damages it sustained by reason of the tortious acts of the defendants was assignable. In *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 232 Fed. 574, 577, 146 C.C.A. 532, this court held that a right of action for property injuries based on a violation of the Sherman Act, and brought under section 7 for treble damages, is assignable.

255 F. at 245. The court argued, however, that although the substance of the right sued upon may be assignable, the form of the assignment may make it void for champerty. *Id.* at 246. *See* Restatement of Contracts § 547 comment f. Defendants' point here is essentially that the fact that Samford and Washington Bank are agreeing to split the proceeds of the litigation is what makes their agreement champertous.

supra; 6 Wright & Miller, Federal Practice and Procedure: Civil § 1544 (1971); 3A Moore's Federal Practice § 17.07 (2d ed. 1976). Virtually all of the cases which have considered the question have been diversity cases involving a state-created cause of action. In *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980), the court raised the question of whether federal or state law controls the assignment of a federal maritime claim but found it unnecessary to decide the question in the light of the particular circumstances of that case.

As discussed in note 3, *supra*, there is a line of precedent holding that federal antitrust claims are assignable as a matter of federal law. Our concern here, however, is not with the substance of assignable claims, but with the form in which the claim may be assigned. *Sampliner* v. *Motion Picture Patents Co.*, 255 F. 244 (2d Cir. 1918), *rev'd on other grounds*, 254 U.S. 233, 41 S.Ct. 79, 65 L.Ed. 240 (1920), is the only case we have been able to discover which addresses this question. *Sampliner* also involved an assignment of a Sherman Act claim. The court noted that antitrust claims were assignable, but then went on to inquire whether, nevertheless, the assignment might be invalid for champerty. It discussed basic common law principles of champerty and then applied the state law of Ohio, where the assignment was made:

> It is said, however, that this assignment was made in Ohio; that the assignor was an Ohio corporation; that the assignee was domiciled in Ohio; that apparently there was at the time no intention of bringing suit on the assignment elsewhere than in Ohio; that whether the lex loci contractus or the lex loci solutionis is to determine the validity of the assignment that the law in this case is the law of Ohio. There is no disagreement on either side on this phase of the subject. We have examined the cases in Ohio, and we have been unable to discover that the question which this case presents has been passed upon by the

> courts of that state, or that there is anything in the statutes of the state or the decisions of its highest court which should lead us to think that by the law of that state the assignment is valid.

255 F. at 250. The court then went on to discuss the relevant Ohio law.[4] Thus, following *Sampliner*, we should apply the champerty doctrines of Louisiana, the law of the place of assignment, as well as the place in which the assignment would be executed and performed, and where all parties to the assignment reside. *Sampliner* appears to hold then, as a matter of federal law, that the federal courts should look to state law. The decision is, however, to be distinguished from the position that state law applies because the federal court sits in a given state and thus should apply its laws under *Erie* principles.

In *Three Rivers Motor Co.* v. *Ford Motor Co.*, 522 F.2d 875 (3d Cir. 1975); *Miami Parts & Spring, Inc.* v. *Champion Spark Plug Co.*, 402 F.2d 83 (5th Cir. 1968); and *Twentieth Century-Fox Film Corp.* v. *Winchester Drive-In Theatre, Inc.*, 351 F.2d 925 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011, 86 S.Ct. 620, 15 L.Ed.2d 526 (1966), it was held that federal and not state law governs the validity of a release of antitrust claims. *See generally* 1A Moore's Federal Practice ¶ 0.323[2] (2d ed. 1976). There is a hidden tension between these decisions and *Sampliner*, since they apply a rule of federal law in the interests of uniformity of treatment of antitrust claims whereas *Sampliner* applies federalist conflict of law notions which suggest that local law will control. Nevertheless, we will follow the decision in *Sampliner*, as it does enunciate a

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[4] When *Sampliner* was appealed to the Supreme Court, the Court, in reversing the Second Circuit's decision did not dispute that Ohio law applied; rather, it held that under the doctrine of champerty used by the lower court, a question of fact for the jury was presented, so that the lower court could not properly have held the agreement champertous as a matter of law. 254 U.S. 233, 239-240, 41 S.Ct. 79, 80-81, 65 L.Ed. 240. *See infra*, at note 6.

general federal rule and is the only case we have discovered which is directly on point.[5]

Louisiana, being a civil law jurisdiction, does not apply general common law principles of champerty. Instead, an equivalent of the doctrine has been created by statute. La.Civ.Code Ann. art. 2447 (West) prohibits the sale of "litigious rights" to "officers of the court," including attorneys. It has long been settled in Louisiana that this prohibition does not apply to persons who are not "officers of the court." *Gilkerson-Sloss Commission Co.* v. *Bond*, 44 La.Ann. 841, 11 So. 220 (1892) (parties who purchased claim were not officers of the court and restrictions of article 2447 did not apply to them); *cf.* La.Civ.Code Ann. art. 2652 (West) ("He against whom a litigious right has been transferred, may get himself released by paying

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[5] For a discussion of the issue of uniformity and the application of federal as opposed to state law, *see* Note, *The Federal Common Law*, 82 Harv.L.Rev. 1512 (1969); Weintraub, *Commentary on the Conflict of Laws*, 464-466 (1971); 1A Moore's Federal Practice ¶ 0.318[1] *et seq.* (2d Ed. 1976).

Following *Sampliner's* rule that we look to state law instead of creating a federal common law of champerty out of whole cloth seems consistent with the spirit of recent decisions by the Supreme Court. In *Robertson* v. *Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 544 (1978), the Court held that 42 U.S.C. § 1988 requires as a matter of federal law that federal courts apply the Louisiana survivorship statute to determine survival of a civil rights action under 42 U.S.C. § 1983 brought in Louisiana. In *Texas Industries, Inc.* v. *Radcliff Materials*, —— U.S. ——, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981), the Supreme Court refused to create a federal common law of contribution for joint antitrust violators. It held that 'contribution does not implicate "uniquely federal interests" of the kind that oblige courts to formulate federal common law.' —— U.S. at ——, 101 S.Ct. at 2068. We think that creation of a federal law of champerty would be equally inappropriate.

Finally we note that it is not necessary for us to decide at this point whether it is the lex loci contractus, the lex loci solutionis or the forum where the parties reside which should be applied to assess the validity of the assignment since, just as in *Sampliner*, all of these fora are the same.

to the transferee the real price of the transfer, together with the interest from its date."). Hence under Louisiana law, the 1978 agreement was not champertous.[6]

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[6] Even if we were wrong in applying Louisiana state law in this case, the agreement would not be champertous on its face under generally recognized common law principles.

Williston describes the relationship between champerty and maintenance and the assignment of lawsuits or choses in action as follows:

> Public policy opposes trafficking in lawsuits. The early common law was very reluctant to permit the assignment of rights of action. Objection was indeed raised on the ground of maintenance to the assignment of any choses in action, and for the same reason the law forbade the transfer of title to real estate which was in the adverse possession of a third person and for which, therefore, an action must be brought.
>
> So far as concerns the assignment of ordinary choses in action, for any other consideration than a share of the proceeds, or to anyone other than an attorney, the law has outgrown its former attitude, even though the claim is litigious.
>
> But the transfer of a claim in litigation or for the collection of which litigation is necessary, in consideration of a promised share of the proceeds of the litigation, is generally held invalid.
>
> . . . .
>
> There is a growing recognition in the cases, however, of a distinction, between
>
> 1. The assignment of a claim merely for the purpose of its enforcement on a speculative basis, the assignor and the assignee agreeing to share the proceeds, and
>
> 2. An assignment for a *bona fide*, substantial consideration.
>
> When the assignment is of the latter type, it is generally upheld even though in addition thereto the assignee promises to enforce it at his own expense and to share the proceeds with the assignor.

14 Williston on Contracts § 1715 (3d Ed. 1972). *Accord*, Restatement of Contracts § 547(2) (1932).

By the terms of the 1978 contract, Samford agrees to prosecute MTTI's claim and pay $5,000 plus the first $53,000 of proceeds from the suit to Washington Bank, in exchange for ownership of MTTI and assignment of MTTI's claim against the defendants. There is

Disposition on Remand

Having disposed of the champerty issue, we next discuss the areas of concern the district court should focus upon on remand.

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additional consideration present on both sides: Washington Bank receives $5,000 and Samford receives MTTI's stock. This alone would indicate that *on its face* the agreement is not champertous with respect to the principles just stated. Moreover, even if MTTI's suit and not ownership of MTTI was the object Samford bargained for, and the additional consideration was a sham, the agreement still might not be champertous. It may well be that Samford, fearing that his earlier 1976 assignment of MTTI's claim was invalid as a fraud on creditors, was attempting to settle the ownership of the claim with the Bank, who had taken control of MTTI after Shirkee Samford's bankruptcy. Thus Samford may have been bargaining to quiet any objections by the Bank as to the earlier 1976 assignment. If so, this additional consideration would prevent the agreement from being champertous. In *Sampliner* v. *Motion Picture Patents Co.*, 254 U.S. 233, 41 S.Ct. 79, 65 L.Ed. 240 (1920), a lawyer, for services for which he was willing to settle for $5,000 in cash, took an assignment of a claim for treble damages by a person injured by violation of the Sherman Act. The lawyer thought that the claim was worth at least $75,000. The United States Supreme Court held that there was a question of fact for the jury as to whether the assignment was champertous on the ground that "clearly some substantial evidence strongly tended to show that the assignment was taken in extinguishment of an existing indebtedness and not for mere speculation upon the outcome of intended litigation." *Id.* at 239-240, 41 S.Ct. at 80-81. A settlement of possible claims by the Bank as regards the 1976 assignment would, like an extinguishment of indebtedness in *Sampliner*, provide an additional bona fide consideration which would save the agreement from invalidity as champertous.

Furthermore, under common law principles, the assignee in a champtertous assignment must be a stranger to the litigation. *Israel Aircraft Industries, Ltd.* v. *Standard Precision*, 559 F.2d 203 (2d Cir. 1977); *Kenrich Corp.* v. *Miller*, 377 F.2d 312 (3d Cir. 1967) (one who was a stockholder at the time of the alleged wrong, and, knowing of the wrong, thereafter sold his stock has in legal contemplation become a stranger to any controversy about the matter).

The trial court in the present case assumed that Zarnoff Samford, having sold his stock and resigned his employment with MTTI in

To begin with, the district court should consider whether the 1976 assignment to Samford gives him an independent basis of standing to pursue this action. First, the district court must address the standing of the defendants, as indicated above; then, assuming that the defendants do have standing, the court must determine whether the assignment is valid, or whether, as defendants have suggested, the assignment is a fraud on creditors.

If the court finds that the 1976 agreement is invalid and grants no standing to Samford, the court must next consider whether the 1978 agreement, coming two years after the suit was filed, gives Samford a right to sue. The 1978 agreement would make Samford the real party in interest as of 1978, but he might not have been a

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1973, was thus a stranger to the litigation in 1978. However, if the 1976 assignment was valid, Samford already had an interest in the litigation at the time he entered into the 1978 agreement with Washington Bank. Without an evidentiary determination as to the validity of the 1976 agreement, the court could not have held the agreement champertous as a matter of law, since if Samford had any interest in the litigation, the agreement could not be champertous. *E.g.*, *Lott* v. *Kees*, 276 Ala. 556, 165 So.2d 106 (1964); *Nationwide Mutual Insurance Co.* v. *McNulty*, 229 So.2d 585 (Fla. 1969); *Schnabel* v. *Taft Broadcasting Company, Inc.*, 525 S.W.2d 819 (Mo. App. 1975); *Groce* v. *Fidelity General Insurance Co.*, 252 Or. 296, 448 P.2d 554 (1968); *Ventro* v. *Clinchfield Coal Corp.*, 199 Va. 943, 103 S.E.2d 254 (1958); 14 Am. Jur. 2d Champerty and Maintenance § 8 (1964); 14 C.J.S. Champerty and Maintenance § 26 (1939); 14 Williston on Contracts § 1714 (3d Ed. 1964); Restatement of Contracts § 543.

Moreover, even if the 1976 assignment were not valid, and Samford had in fact no interest in the litigation, the agreement with Washington Bank would not be champertous if Samford had a reasonable belief that he was interested. *Kenrich Corp.* v. *Miller*, 256 F.Supp. 15 (E.D. Pa. 1966), *aff'd*, 377 F.2d 312 (3d Cir. 1967); *Ames* v. *Hillside Coal & Iron Co.*, 314 Pa. 267, 272, 171 A. 610, 612 (1934); 14 C.J.S., *supra*; 14 Williston, *supra*; Restatement of Contracts § 543. Once again some sort of evidentiary hearing would have been necessary to determine this issue.

proper party in 1976 when the suit was filed. MTTI, from whom Samford received the claim, might have been a proper party then, and it was joined as a plaintiff by Samford's first amended complaint. The court must decide, however, in the light of the bankruptcy proceedings pending in early 1976, who had authority to bring MTTI into this suit as a plaintiff, and what effect, of any, this question has on whether MTTI was properly a plaintiff when Samford's complaint was amended to include it as one. In sum, the court must decide, based upon the facts and circumstances of the case, to what extent Samford's acquisition of standing in 1978 would relate back to the time of filing.

Finally, even if Zarnoff Samford has no standing to bring this suit on behalf of MTTI, MTTI was listed independently as a plaintiff in the complaint. When the district court dismissed defendants from this action, it therefore apparently dismissed MTTI's suit as well as Samford's. On remand the district court should consider whether MTTI is properly a party to this suit even if Samford is not. This question will involve consideration of who now owns MTTI and who had authority to bring suit against defendants on behalf of MTTI when the original complaint was amended to include MTTI as a plaintiff.

In deciding these matters and resolving who is a proper party to this suit, the court should make clear whether it bases its actions on Rule 12(b)(1), a motion for dismissal based on subject matter jurisdiction, or upon some other ground; this may have a significant impact on the question of relation back, as well as on the standards of review by an appellate court. The trial court is strongly encouraged, after a full evidentiary hearing, to state its views in terms of findings of fact and conclusions of law. Although with respect to decisions under Rule 12 and Rule 56 the Federal Rules of Civil Procedure do not require a trial court to make findings of fact, *see* Rule

42(a), it is a very useful practice, and often invaluable for later appellate review. *See generally Williamson* v. *Tucker*, 645 F.2d 404 (5th Cir. 1981). Finally, because of the complexity of these issues, a request for additional briefing by the parties may be necessary and is also strongly recommended.

The judgment of the district court is vacated and the case remanded for further proceedings consistent with the above. The defendants shall bear all the costs of this appeal.

VACATED and REMANDED.

APPENDIX B

Minute Entry
Mitchell, J.
April 18, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-640
Section "F"

HARRY MARTIN, ZARROFF O. SAMFORD AND SHIRKEE A. SAMFORD

v.

MORGAN DRIVE AWAY, INC., NATIONAL TRAILER CONVOY, INC., AND TRANSIT HOMES, INC.

This matter was submitted to the Court on a former date. The Court having considered the arguments of counsel, the memoranda filed by counsel and the law applicable to the case; accordingly:

IT IS ORDERED that the Joint Motion of the defendants, Morgan Drive Away, Inc., National Trailer Convoy, Inc., and Transit Homes, Inc. dismissing plaintiff Zarnoff O. Samford's individual claims and his claim on behalf of Martin Trailer Toters, Inc. is GRANTED.[1]

/s/ Lansing L. Mitchell
United States District Judge

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[1] Plaintiff Zarnoff O. Samford has failed to amend his complaint with regard to his individual claim for an anti-trust violation and therefore he has failed to state a cause of action in his individual capacity.

With regard to his claim on behalf of Martin Trailer Toters, Inc. the Court finds the defendants are entitled to a dismissal on the basis of their champerty defense. A champertous agreement is an agreement whereby a person without interest in another's suit undertakes to carry it out at his own expense, in whole or in

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part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation. 14 Corpus Juris Secundum, Champerty and Maintenance, Section 1, p. 356. 22 ALR2d 1011. As a general rule a defendant cannot avail himself of a champertous agreement to which he is not a party as a defense to an action brought against him. However, there is an exception to the rule where the plaintiff in the action is a mere volunteer in the action and is suing the defendant solely on rights or claims assigned to him in a champertous agreement. *American Optical Company* v. *Curtiss*, 56 FRD 26 (S.D.N.Y.1971); *Welch* v. *Coro*, 97 FS 185 (S.D.N.Y.1951).

The Court finds the plaintiff Samford derives his right of action from the agreement which he entered into with the Washington Bank and Trust Company on May 8, 1978. By virtue of the agreement Samford purchased the Martin Trailer Toters, Inc. stock and was assigned the claim in this proceeding. Zarnoff agreed to prosecute the claim and to be responsible for all costs of the litigation. The Bank was to obtain partial payment for the stock from the proceeds of the lawsuit or any settlement therein. Samford as the sole shareholder would benefit from the remaining proceeds. The Court finds this agreement is champertous and therefore Zarnoff O. Samford does not have standing to bring this suit.

APPENDIX C

UNITED STATES OF AMERICA
STATE OF LOUISIANA
PARISH OF WASHINGTON

SALE OF STOCK
BY: WASHINGTON BANK AND TRUST COMPANY
TO: ZARNOFF O. SAMFORD

BE IT KNOWN That on this 8th day of May, 1978, in the year of Our Lord, one thousand nine hundred and seventy-eight.

BEFORE ME, Richard W. Brown, a Notary Public duly commissioned and qualified in and for the Parish of Washington, State of Louisiana, therein residing, and in the presence of the witnesses hereinafter named and undersigned:

PERSONALLY CAME AND APPEARED: Washington Bank and Trust Company appearing herein through Roy Richard who declared that they have sold and delivered, and does by these presents, grant, bargain, sell, assign, transfer, set over and deliver, without any warranty whatsoever unto Zarnoff O. Samford, here present, who accepts, all and singular and acknowledges that there has been duly delivered to him fifty-four (54) shares of Martin Trailer Toters, Inc. stock.

TO HAVE AND TO HOLD the above described stock unto the said purchaser, his heirs, and assigns, forever.

This sale is made for and in consideration of the price and sum of ONE THOUSAND AND NO/100 ($1,000.00) DOLLARS to be paid immediately upon execution of this document and an additional FOUR THOUSAND AND NO/100 ($4,000.00) DOLLARS to be paid within ninety (90) days of the date hereof and other valuable consideration, the said Washington Bank and Trust Company acknowledges receipt of the ONE THOUSAND DOLLARS

AND NO/100 and grants acquittance and discharge therefor.

THUS DONE AND PASSED in my office in Bogalusa, Louisiana, on this day, month, and year herein first above written, in the presence of Rosanne C. Butler and H. Gregory Briese competent witnesses, who hereunto sign their names with the said appears and me, Notary, after reading of the whole.

/s/ Roy Richard
WASHINGTON BANK AND TRUST COMPANY
By: ROY RICHARD

/s/ Zarnoff O. Samford
ZARNOFF O. SAMFORD

WITNESSES:

/s/ Rosanne C. Butler

/s/ H. Gregory Briese

/s/ Richard W. Brown
Notary Public

[NOTE]

$4,000.00 May 8, 1978

Ninety-days after date I promise to pay to the order of Washington Bank and Trust Company at Bogalusa, Louisiana Four Thousand and no/100 ($4,000.00) Dollars for value received, with interest at the rate of 8% per cent per annum from date until paid.

The makers of this note and the endorsers, guantors and sureties hereon hereby severally waive presentment for payment, demand notice of non-payment, protest, and all pleas of division and discussion, and agree that the time of payment hereof may be extended from time to time, one or more times, without notice of such extension, or extensions and without previous consent, hereby binding themselves, in solido, unconditionally and as original promissors, for the payment thereof in principal, interest, cost and attorney's fees. All parties hereto further, severally agree that this note evidences and sets forth their entire agreement with the holder hereof, that they hereby consent to all the terms and conditions hereof, and that no modification hereof shall be binding unless hereon endorsed in writing and signed by the parties.

No delay on the part of the holder hereof in exercising any rights hereunder shall operate as a waiver of such rights.

Should this note not be paid at maturity or when due or demandable, as herein provided, or should it become necessary to employ an attorney to enforce the same or recover the amount hereof or any portion of same, or should this note be placed in the hands of an attorney for collection or compromise or for any other reason the makers, endorsers, guarantors and sureties and each of them hereby agree to pay the fees of such attorneys, which are hereby fixed at twenty per cent on the amount then due on this note with interest and all costs.

No. ———— /s/ Zarnoff O. Samford

AGREEMENT

STATE OF LOUISIANA
PARISH OF ORLEANS

This agreement by and between Zarnoff O. Samford and the Washington Bank and Trust Company.

WHEREAS the parties hereto have entered into a sale of the entire stock consisting of fifty-four (54) shares of Martin Trailer Toters, Inc., from the Washington Bank and Trust Company unto Zarnoff O. Samford for the consideration of ONE THOUSAND AND NO/100 ($1,000.00) DOLLARS and an additional FOUR THOUSAND AND NO/100 ($4,000.00) DOLLARS to be paid within three months of the execution of the said sale and other valuable consideration;

WHEREAS, there is presently pending in the United States District Court for the Eastern District of Louisiana, a lawsuit bearing number 76-640, entitled Harry Martin, Zarnoff O. Samford, and Shirkee A. Samford vs. Morgan Drive Away, Inc., National Trailer Convoy, Inc., and Transit Homes, Inc., and,

WHEREAS, the said Zarnoff O. Samford, by virtue of the assignment of this claim by other parties plaintiff and the sale of the Martin Trailer Toters, Inc. stock by the Washington Bank and Trust Company unto Zarnoff O. Samford, the said Zarnoff O. Samford as party plaintiff is proceeding with the prosecution of the said claim, and,

WHEREAS, the said sale of the Martin Trailer Toters, Inc. stock, by the Washington Bank and Trust unto Zarnoff O. Samford is for a stipulated price in addition to other valuable consideration.

NOW, therefore, it is understood and agreed by and between the parties hereto that the other valuable consideration contained in the sale of the Martin Trailer Toters, Inc. stock, unto Zarnoff O. Samford is to be pay-

ment of the remaining indebtedness of FIFTY-NINE THOUSAND, NINE HUNDRED AND THIRTEEN AND NO/100 ($59.913.00) DOLLARS, owed to the Washington Bank and Trust by Martin Trailer Toters, Inc. at the completion of the above mentioned lawsuit and after the completion of said lawsuit out of the proceeds, if any, received by way of settlement or judgment.

IT IS FURTHER UNDERSTOOD that the said Zarnoff O. Samford is prosecuting and controlling the aforementioned antitrust claim against the named defendants above mentioned and is to be responsible for all costs of litigation.

THUS AGREED TO AND SIGNED AT Bogalusa, Louisiana this 8th day of May, 1978.

/s/ Zarnoff O. Samford
ZARNOFF O. SAMFORD

/s/ Roy Richard
WASHINGTON BANK AND TRUST COMPANY

WITNESSES:

/s/ Roseanne S. Butler

/s/ H. Gregory Briese

/s/ Richard W. Brown
Notary Public

APPENDIX D

LOUISIANA PUBLIC SERVICE COMMISSION

ORDER NO. T-13189

Docket No. T-13189

MARTIN TRAILER TOTERS, INC. (BOGLAUSA, LOUISIANA),

and

WASHINGTON BANK & TRUST COMPANY
(BOGALUSA, LOUISIANA)

and

STEVENS MOBILE HOMES, INC. (LAFAYETTE, LOUISIANA),
EX PARTE

In re: Transfer of right, title and interest in Certificate No. 5443-A from the former to the latter, as set forth in application. (Amended at hearing to correct transferee to read "Stevens Mobile Home Transport Company" (a Louisiana corporation).)

(Tried and Decided November 23, 1976)

In view of the evidence present in the record of this case after trial of the matter, the Commission finds that the proposed transfer would not adversely affect the public convenience and necessity; and the application is, accordingly

ORDERED approved; conditioned upon transferee's full compliance with the law and the rules and regulations of the Commission bearing thereon.

BY ORDER OF THE COMMISSION:
BATON ROUGE, LOUISIANA
JANUARY 14, 1977

/s/ Louis J. Lambert
Chairman

/s/ Thomas E. Powell
Vice Chairman

/s/ Nat B. Knight, Jr.
Commissioner

/s/ Ed Kennon
Commissioner

/s/ John Schwegmann, Jr.
Commissioner

/s/ [Illegible]
Secretary

Opposition

No. 81–1888

Office - Supreme Court, U.S.
FILED
JUL 8 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MORGAN DRIVE AWAY, INC.,
NATIONAL TRAILER CONVOY, INC.
and TRANSIT HOMES, INC.,

Petitioners,

v.

ZARNOFF O. SAMFORD and
MARTIN TRAILER TOTERS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JACQUES F. BEZOU
Garon, Brener & McNeely
829 Baronne Street
New Orleans, Louisiana 70113
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Counsel for Respondents

QUESTION PRESENTED

Did the Court of Appeals err in concluding that Louisiana law should be applied to determine the issue of alleged champerty?

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No. 81-1888

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MORGAN DRIVE AWAY, INC.,
NATIONAL TRAILER CONVOY, INC.
and TRANSIT HOMES, INC.,

Petitioners,

V.

ZARNOFF O. SAMFORD and
MARTIN TRAILER TOTERS, INC.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Pertinent Background

In addition to obtaining an assignment to sue and prosecute this claim on behalf of Martin Trailer Toters, Inc., ("MTTI"), Zarnoff O. Samford is the sole stockholder of MTTI. Respondents adopt by reference pages 1 - 4 of the decision of the Court of Appeals which succinctly states the background of this case. Respondents would add, however, the fact that the trustee in bankruptcy abandoned and dis-

claimed any interest in the MTTI stock and concomitantly in this litigation.

B. The Proceedings Below

This litigation commenced in the Eastern District of Louisiana on March 6, 1976 and was originally brought by Zarnoff O. Samford, Shirkee Samford and Harry Martin, in their individual capacities as former or then-present owners of MTTI. The complaint alleged violations by defendants of Section 1 and 2 of the Sherman Act. Plaintiffs sought injunctive relief as well as damages for injuries to MTTI allegedly caused by defendants practices. The defendants moved to dismiss on the ground that the plaintiffs as shareholders, had no standing to file an action for injuries sustained by the corporation. On April 23, 1976, plaintiffs amended their complaint by adding MTTI as a plaintiff. On June 14, 1976, plaintiffs filed a "Second Amending Complaint" which stated that on January 16, 1976 (two months prior to the original complaint and ten days before Shirkee Samford filed for bankruptcy), MTTI had assigned its claim against defendants to Zarnoff O. Samford. On June 23, 1976, Zarnoff Samford filed a "Third Amending Complaint" that eliminated these original parties, but MTTI remained in the suit. Two years later, on June 9, 1978, defendants filed a supplemental memorandum in support of their motion to dismiss and on March 9, 1979 the trial court denied defendants' motion to dismiss. Defendants again moved to dismiss the complaint and on April 18, 1980 the trial court dismissed the plaintiffs complaint against defendants on the same grounds that it refused to do so earlier. The trial court did not mention MTTI as a plaintiff or MTTI's suit when the court dismissed the litigation. On January 11, 1982 the Court of Appeals vacated the judgment of the District Court and remanded the case for further proceedings. From the ruling of the Court of Appeals, the petitioners have sought a writ of certiorari in the United States Supreme Court.

REASONS FOR DENYING THE WRIT

There is a case in point contrary to the position of the petitioners. *Sampliner v. Motion Picture Patents Co.*, 255 F. 244 (2nd Cir. 1918), *reversed on other grounds*, 254 U.S. 233 (1920), involved an assignment of a Sherman Act claim. The ultimate issue was whether or not the assignment might be invalid on the ground of champerty. The Court applied the state law of Ohio where the assignment was made:

> It is said, however, that this assignment was made in Ohio; that the assignor was an Ohio corporation; that the assignee was domiciled in Ohio; that apparently there was at the time no intention of bringing suit on the assignment elsewhere than in Ohio; that whether the lex loci contractus or the lex loci solutionsis is to determine the validity of the assignment that the law in this case is the law of Ohio, and we have been unable to discover that the question which this case presents has been passed upon by the courts of the state, or that there is anything in the statutes of the state or the decisions of its highest court which should lead us to think that by the law of that state the assignment is valid.
>
> 255 F. at 250.

The Fifth Circuit Court of Appeals in the case *sub judice*, 665 F. 2d 598, at 604, specifically relied on the dialectic of *Sampliner*, supra, holding that:

> Thus, following *Sampliner*, we should apply those champerty doctrines of Louisiana, the law of the place of assignment, as well as the place at which the assignment would be executed as

performed, and where all parties to the assignment reside. *Sampliner* appears to hold then, as a matter of *federal* law, that the Federal Court should look to *state* law. The decision is, however, to be distinguished from the position that state law applies because the federal court sits in a given state and thus should apply its laws on *Erie* principals."

The Court of Appeals went on to say that:

"Nevertheless, we will follow the decision in *Sampliner*, as it does enunciate a general federal rule and is the only case we have discovered which is directly on point."

There is no federal law of champerty and the Fifth Circuit further held that:

"Following *Sampliner's* rule that we look to state law instead of creating a federal common law of champerty out of whole cloth seems consistent with the spirit or recent decisions by the Supreme Court. In *Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed. 2d 554 (1978), the Court held that 42 U.S.C. § 1988 requires as a matter of federal law that federal courts apply the Louisiana survivorship statute to determine survival of a civil rights action under 42 U.S.C. § 1983 brought in Louisiana. In *Texas Industries, Inc. v. Radcliff Materials*, ____ U.S. ____, 101 S. Ct. 2061, 68 L.Ed.2d 500 (1981), the Supreme Court refused to create a federal common law of contribution for joint antitrust violators. It held that 'contribution does not implicate 'uniquely federal interests' of the kind that oblige courts to formu-

late federal common law.' ____ U.S. at ____, 101 S.Ct. at 2068. We think that creation of a federal law of champerty would be equally inappropriate."

665 F.2d 598, at 605 fn 5.

Buttressing respondents' position that the writ should not be granted is the fact that even if common law principals of champerty would have been applied by the Court of Appeals the result would have been the same and the Court of Appeals so held:

"Even if we were wrong in applying Louisiana state law in this case, the agreement would not be champertous on its face under generally recognized common law principles."

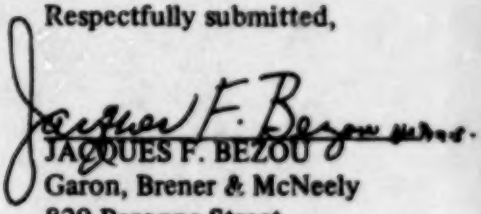
605 F.2d 598 at 605 fn 6.

Moreover, the Supreme Court in *Sampliner* held that champerty is a *jury* question, not properly considered by the judge. The instant case shall be tried to a jury. 254 U.S. 233, 239-240.

CONCLUSION

For all of the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,



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Date: July 2, 1982